Supreme Court, U.S.
FILED

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No.

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IN THE

Supreme Court of the United States

ELIZABETH FEASTER,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD OF NURSING,

Respondent,

On Petition For Writ Of Certiorari To The
District Court of Appeal, First District, State of Florida

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. §12131-12165, against the Florida Board of Nursing for discrimination against an applicant for a nursing license based upon the applicant's mental impairment.

PARTIES TO THE PROCEEDING

Petitioner is Elizabeth Feaster (Fe aster").

Respondent is State of Florida, Department of Health, Board of Nursing ("FBN").

This is a proceeding in which the constitutionality of Title II of the Americans with Disabilities Act, 42 U.S.C. §12131-12165, is called into question and 28 U.S.C. §2403(a) may apply. In accordance with Rule 29.4(b), petitioner will serve a copy of this petition on the Solicitor General of the United States.

CORPORATE DISCLOSURE STATEMENT

Feaster is an individual. Therefore, there are no parent corporations or subsidiaries.

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Feaster respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida in this case.

OPINIONS AND ORDERS BELOW

The District Court of Appeal, First District, State of Florida opinion (App. A) is reported at 846 So.2d 1238 (Fla. 1st DCA 2003). The order (App. B) entered by L. Haldane Taylor, Circuit Judge of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, is non-published.

STATEMENT OF JURISDICTION

This district court of appeal entered its opinion on June 9, 2003. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eleventh and Fourteenth Amendments to the United States Constitution and Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-12165.

The Eleventh Amendment states in pertinent part as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment states in pertinent part as follows:

> SECTION 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title II of the Americans with Disabilities Act of 1990 states in pertinent part as follows:

"The term 'public entity' means-
(A) any State or local government;
(B) any department, agency, special purpose district, or other instrumentality of a State... 42 U.S.C. § 12131.

* * *

"...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

STATEMENT OF THE CASE

In January 1999, Elizabeth Feaster ("Feaster") started the Registered Nurse degree program at Daytona Beach Community College ("DBCC"). In accordance with the Americans with Disabilities Act of 1990 ("ADA"), DBC provided Feaster with special accommodations through their Student Disability Services. She required special accommodations due to the fact she suffered a closed head injury in 1998, which resulted in mental impairment of loss of ability to perform tasks that measure attention such as examinations. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors. (App.).

Following Feaster's graduation from the DBCC Nursing Program, she applied to the Florida Board of Nursing ("FBN") for nursing licensure. She first took the licensure examination at the Sylvan Learning Center in Jacksonville. While she expected to take the licensure

examination in a quiet room with few people taking the exam, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam. (App.).

Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination. FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination. Instead, FBN's response to Feaster's request was to sua sponte reconsider her application for licensure and determined that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety. (App.).

The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners." The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession. Consequently, FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession. (App.).

Feaster filed a complaint in the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida in which she alleged that the failure of the FBN to provide her with reasonable accommodation during her nursing licensure exam on the basis of her disability violated Title II of the ADA, 42 U.S.C. § 12131, *et seq.*

The complaint named FBN as defendant, and sought both damages and injunctive relief.[1] (App.).

The circuit court dismissed Feaster's complaint with prejudice. (App.). The circuit court held that under *Board of Trustees of the Univ. of Alabama v. Garret,* 531 U.S. 356 (2001) and *Association for Disabled Americans, Inc. v. Florida International University,* 178 F. Supp. 2d 1291 (S.D. Fla. 2001), the Eleventh Amendment bars suits under Title II of the ADA. (App.).

Feaster filed a timely notice of appeal to the District Court of Appeal, First District, State of Florida. The District Court of Appeal affirmed the Circuit Court's dismissal of Feaster's case in a per curiam opinion on June 9, 2003. The opinion cited *Ass'n of Disabled Ams., Inc. v. Fla. Int'l Univ.*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001), and *Dept of Highway Safety & Motor Vehicles v. Rendon,* 832 So. 2d 141 (Fla. 3d DCA 2002) as its authority.[2]

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[1] The dismissal of the request for injunctive relief is not at issue in this proceeding.

[2] The District Court of Appeal was the state court of last resort for Feaster in this case because a per curiam affirmed opinion is not appealable to the Florida Supreme Court. See *Persuad v. State,* 838 So.2d 529 (Fla. 2003).

REASONS FOR GRANTING THE WRIT

I.

THE FLORIDA DISTRICT COURT OF APPEAL OPINION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT AND IS THE SAME QUESTION FOR WHICH CERTIORARI HAS BEEN GRANTED AND REVIEW PENDING IN LANE V. TENNESSEE.

The question presented in this case is whether the Eleventh Amendment bars suit under Title II of the ADA. In *Board of Trustees of the Univ. of Alabama v. Garrett,* 531 U.S. 356 (2001) this Court settled the question as to Title I of the ADA, but expressly declined to decide the question as to Title II.

Subsequent to Garrett, the United States Courts of Appeal and underlying District Courts and State Courts have become widely split on this question in regard to Title II. In light of the conflict, this Court granted certiorari to review the question as to Title II in *Medical Board of California v. Hason,* 279 F.3d 1167 (9th Cir. 2003, *petition for writ of certiorari granted* 123 S.Ct. 561 (November 18, 2002). However, the Medical Board of California subsequently moved to dismiss the petition which this Court granted. *Id. petition for writ of certiorari dismissed* 123 S.Ct. 1779 (April 7, 2003).

This Court has again granted certiorari to review this question in *Lane v. Tennessee,* 315 F.3d 680 (6th Cir. 2003, *petition for writ of certiorari granted* 123 S.Ct. 2622 (June 23, 2003). *Lane* is currently pending review of this Court

In *Lane*, The Sixth Circuit followed its prior decision in *Popovich v. Cuyahoga County Court of Commons Pleas,* 276 F.3d 808 (6th Cir. 2001) holding that the Eleventh Amendment barred Title II claims based upon equal protection violations, but did not bar such claims for violations of due process.

II.

THE UNITED STATES COURTS OF APPEAL AND UNDERLYING DISTRICT COURTS AND STATE COURTS ARE WIDELY SPLIT ON THE QUESTION PRESENTED.

The United States Courts of Appeal and underlying Federal District Courts and State Courts are widely split on the application of the Eleventh Amendment to Title II of the ADA. As stated above, the Sixth Circuit held in *Lane* and *Popovich* that the Eleventh Amendment bars Title II claims based upon equal protection violations, but does not bar such claims for violations of due process.

The First and Second Circuits have differing standards for limiting the scope of states' Eleventh Amendment immunity from Title II actions. In *Kiman v. New Hampshire Dept. of Corrections,* 301 F.3d 13 (1st Cir. 2002), the court held Title II actions are permitted against the states in cases in which the court identifies a constitutional violation by the state. In *Garcia v. S.U.N.Y Health Sciences Center,* 280 F.3d 98 (2nd Cir. 2001), the court held that Title II actions may only be brought against states if the plaintiff can establish the violation was motivated by discriminatory animus or ill will based upon the plaintiff's disability.

The Fourth, Fifth and Tenth Circuits hold that the Eleventh Amendment bars all Title II claims against the states. *See Brown v. North Carolina Division of Motor Vehicles,* 166 F.3d 698 (4th Cir. 1999); *Reickenbacker v. Foster,* 274 F.3d 974 (5th Cir. 2001); *Thompson v. Colorado,* 278 F.3d 1020 (10th Cir. 2001).

In stark contrast to the above opinions is the Ninth Circuit's decision in *Hason v. Medical Board of California,* 279 F.3d 1167 (9th Cir. 2002), which held that Congress completely abrogated the states' Eleventh Amendment immunity in enacting the ADA. Therefore, Title II claims are permitted against the states for any alleged violation.

III.

THE FLORIDA DISTRICT COURT OF APPEAL OPINION CONFLICTS WITH UNITED STATES COURT OF APPEALS DECISIONS ON THE SAME IMPORTANT QUESTION OF FEDERAL LAW.

The Florida District Court of Appeal decision in this case follows the standard applied in Fourth, Fifth and Tenth Circuits, that the Eleventh Amendment bars all Title II claims against the states. Accordingly, the decision conflicts with the above-referenced decisions of the First, Second, Sixth and Ninth Circuits.

Conclusion

For the above reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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APPENDIX

APPENDIX A

846 So.2d 1238

District Court of Appeal of Florida,
First District.

Elizabeth FEASTER, Appellant,
v.
STATE of Florida, DEPARTMENT OF HEALTH, BOARD OF NURSING, Appellee.

No. 1D02-1631.

June 9, 2003.

An appeal from the Circuit Court for Duval County, L. Haldane Taylor, Judge.

James N. Charles, Celebration, for Appellant.

Charlie Crist, Attorney General, Charlie McCoy and Joseph B. Donnelly, Assistant Attorneys General; Thomas E. Warner, Solicitor General, and Louis F. Hubener, III, Deputy Solicitor General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 178 F.Supp.2d 1291 (S.D.Fla.2001); *Dep't of Highway Safety & Motor Vehicles v. Rendon*, 832 So.2d 141 (Fla. 3d DCA 2002).

ERVIN, KAHN and PADOVANO, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NUMBER: 01-7361-CA
DIVISION: CV-B

ELIZABETH FEASTER,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, BOARD QF NURSING,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

This matter is before the Court on the Complaint filed by Elizabeth Feaster (applicant), on November 1, 2001, and the Motion to Dismiss filed by the State of Florida, Department of Health, Board of Nursing (nursing board), filed on December 6, 2001. The Court held a hearing on the Motion on February 12,2001. Both parties were represented by counsel. The Court, having heard arguments of counsel, having fully considered the record, including the pleadings and memoranda filed by counsel, and otherwise being fully advised, makes the following findings of fact and conclusions of law.

Findings of Fact

1. The Complaint alleges money damages for violations of 42. U.S.C. § 1213 1-32, the Americans with Disabilities Act of 1990 (ADA).

2. The applicant alleges that she suffered a closed head injury in 1998 that resulted in a "mental impairment." (Compl. ¶ 6.)

3. The applicant further alleges that she failed her licensing examination because the nursing board provided a special testing site with a dozen other test-takers, instead of a "quiet room with few people." (Compl. ¶ 12-14.)

4. The applicant's second request for a special setting for her examination resulted in a request that she appear before the nursing board to undergo an independent evaluation to determine "whether she is able to practice as a registered nurse with reasonable skill and safety." (Compl. ¶ 21.)

Conclusions of Law

The United States Supreme Court holds that the Eleventh Amendment bars ADA suits by private citizens against states for money damages. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356(2001); see also Association for Disabled Ams.. Inc. v. Florida Int'l Univ.,. 178 F. Supp. 2d 1291 (S.D. Fla. 2001) (holding that the Eleventh Amendment bars suit under Title II of the ADA). The high court, in so holding, reversed the contrary conclusion of Eleventh Circuit Court of Appeals. See Garrett v. University of Alabama Bd. of Trustees, 261 F.3d 1242 (11th Cir. 2001) (after remand from the United States Supreme Court, holding that action for money damages for state's failure to comply with the ADA are barred by the Eleventh Amendment), reversed in part on other grounds, 276 F.3d 1227 (11th Cir. 2001) (remanding for determination whether the state, by accepting federal financial assistance waived immunity under the Rehabilitation Act). The applicant's reliance upon the lower court Garrett case, and upon a footnote in the supreme court's Garrett case, thus is misplaced in view of

the Garrett language on remand, and the express holding of Association for Disabled Americans.

The high court moreover holds that Congress cannot subject a state to suit in a state court without the state's consent. Alden v. Maine, 527 U.S. 706 (1999). The nursing board's Motion to Dismiss must be granted with prejudice. Garrett; Association for Disabled Ams; Alden.

Therefore, it is

ORDERED and **ADJUDGED** that the nursing board's Motion to Dismiss is **GRANTED** with prejudice.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this _____ day of _____, 2002.

ORDER ENTERED
MAR 14 2002
/S/ L. HALDANE TAYLOR

_____
CIRCUIT JUDGE

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APPENDIX C

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:
DIVISION:

ELIZABETH FEASTER,
Plaintiff,

v.

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,
BOARD OF NURSING,
Defendant.
_____/

COMPLAINT

Plaintiff, Elizabeth Feaster ("Feaster"), sues defendant, State of Florida, Department of Health, Board of Nursing ("FBN"), and alleges as follows:

1. This is an action for damages in excess of $15,000 and injunctive relief under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131, *et seq.*

2. This court has jurisdiction as the state courts have concurrent jurisdiction with the federal courts of actions under the ADA.

3. FBN is an agency of state government with its headquarters for operations in Jacksonville, Duval County, Florida.

4. FBN is a public entity as defined by 42 U.S.C. § 12131(1).

5. Feaster is a qualified individual with a disability as defined by 42 U.S.C. § 12131(2).

6. Feaster suffered a closed head injury in 1998, which resulted in a mental impairment of loss of ability to perform tasks that measure attention such as examinations.

7. In January 1999, Feaster started the Registered Nurse degree program at Daytona Beach Community College ("DBCC").

8. In accordance with the ADA, DBCC provided Feaster with special accommodations through their Student Disability Services. These accommodations included extra time for testing and assignments, private setting for testing, note taker during classroom lecture and taped test.

9. Feaster graduated from the DBCC Nursing Program, receiving an A.S. degree with Honors.

10. Following her graduation from the DBCC Nursing Program, Feaster applied to FBN for nursing licensure.

11. Feaster first took the licensure examination at the Sylvan Learning Center in Jacksonville.

12. Feaster expected to take the licensure examination in a quiet room with few people taking the exam.

13. Instead, the licensure examination was given in a room with a dozen people taking other exams and people coming in and out to test on the computers.

14. The entire environment of the licensure examination was noisy and distracting, which caused Feaster to fail the exam.

15. Feaster subsequently applied to FBN for reasonable accommodation during the licensure examination.

16. Feaster supplied FBN with letters from a neurophsychologist, Dr. Pritchard, and the Chairperson of the DBCC Department of Nursing, Linda Miles.

17. Both Dr. Pritchard and Ms. Miles corroborated Feaster's need for accommodation such as a private room without distractions and a 10 -minute break every hour.

18. Dr. Pritchard stated in her letter that Feaster was "highly motivated."

19. Ms. Miles stated in her letter that Ms. Feaster was an "exemplary student" in the program and would be an "asset to the nursing profession."

20. FBN refused to grant Feaster's request for reasonable accommodation during the licensure examination.

21. FBN response to Feaster's request for reasonable accommodation during the nursing licensure examination was to sua sponte reconsider her application for licensure and determining that she must undergo an independent evaluation by the Intervention Project for Nurses ("IPN") to determine whether she is able to practice as a registered nurse with reasonable skill and safety and requiring her to appear before FBN and demonstrate her ability to practice with reasonable skill and safety.

22. FBN has violated the ADA by refusing to grant petitioner's request for reasonable accommodation for the nursing licensure examination.

23. FBN response to Feaster's request for reasonable accommodation for the nursing licensure examination, by sua sponte reconsidering her application for licensure and requiring her to undergo the IPN evaluation and appear before the board and demonstrate her ability to practice with reasonable skill and safety is in violation of the ADA.

24. Feaster can meet, with reasonable accommodation, the essential requirements for receiving the nursing license.

25. FBN has imposed an additional burden upon Feaster in order by requiring her compliance with additional criteria based upon her disability.

26. The IPN program operates under § 456.076, Fla. Stat., "Treatment programs for impaired practitioners."

27. The IPN program groups drug and alcohol abusers together with those having physical or mental impairments. As a result, individuals directed into the IPN program are stigmatized within the nursing profession.

28. FBN's requirement that Feaster undergo an evaluation in the IPN program subjects her to being stigmatized as an "impaired practitioner" within the nursing profession.

29. FBN subjects Feaster to greater inquiry and scrutiny than other applicants.

30. FBN has discriminated against Feaster on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8).

Count I: Injunctive Relief

31. Feaster re-alleges and incorporates herein the allegations in paragraphs 1-30.

32. Feaster has a legal right and interest in being able to apply for nursing licensure and in taking the licensure exam with reasonable accommodation without being subjected to discrimination on the basis of her disability.

33. FBN's continuing discrimination against Feaster on the basis of her disability in violation of 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(6) and (8), unless and until enjoined by order of this court, will cause irreparable injury to Feaster in that, as a direct and proximate result of FBN's conduct, Feaster is suffering the violation of her rights and is being prevented from entering the nursing profession and subjects her to being stigmatized as an "impaired practitioner" within the nursing profession

34. Feaster is entitle to recovery of her attorney's fees under the ADA and is obligated to pay her attorney a reasonable fee for his services.

WHEREFORE, Feaster demands judgment against FBN for a permanent injunction enjoining FBN from discriminating against her on the basis of her disability.

Count II: Damages

35. Feaster re-alleges and incorporates herein the allegations in paragraphs 1-30.

36. As a direct and proximate result from FBN's discrimination against Feaster on the basis of her disability and its violation of her rights under Title II of the ADA, Feaster has suffered money damages including, but not limited to, loss of earnings in her profession.

37. Feaster is entitle to recovery of her attorney's fees under the ADA and is obligated to pay her attorney a reasonable fee for his services.

WHEREFORE, Feaster demands judgment against FBN for damages, attorney's fees and costs and demands a jury trial for all issues so triable.

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